IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 246 OF 2005

Govind Gangaram Khedekar & Ors. ... Appellants.

Versus

Savitri Ramji Khedekar..... ... Respondent.

Mr. Singhavi with Ms.Shalini Patil
for the Appellants.

Mr. Sanjeev Sawant with Mr. H. V. Kode
for the Respondent.

CORAM : A. S. OKA, J.

DATED : 21ST APRIL, 2005.

P.C.:

Heard learned Counsel appearing for the parties.

2. Second Appeal is admitted on the following substantial question of law:

(1) Whether the appellate court could have passed a decree for partition in favour of the respondent without setting aside the finding recorded by the trial court

that the suit lands were not proved to be ancestral lands belonging to the family of the respondent and appellants?

2. Considering the facts and circumstances of the case and by consent of the parties, the appeal is taken up for hearing forthwith.

3. Learned advocate appearing for the appellants, Shri Singhavi, submitted that the appellate court has not recorded any finding as to whether the suit lands were ancestral properties of Bala or the self acquired properties of Bala. He pointed out that in fact there is no finding recorded by the appellate court as regards the nature of the suit lands. He submitted that assuming that the suit lands were ancestral properties in the hands of Bala, in that case the respondent cannot get 1/2 share in the properties and the share will be less than 1/2. Learned advocate further pointed out that the appellate court has not recorded any reason for coming to the conclusion that the respondent is entitled to a decree of partition.

4. Shri Sawant, learned advocate appearing for the

respondent supported the impugned judgment and decree of the appellate court. He pointed out the finding recorded by the learned trial Judge on issue No.4 and submitted that the decree passed by the appellate court requires no interference. Lastly, it is submitted by the learned advocate that if this court is of the view that the proper findings are not recorded by the appellate court instead of keeping the appeal pending, the same may be remanded to the appellate court.

5. I have considered the rival submissions. The suit filed by the respondent / plaintiff is on the footing that the suit lands are ancestral properties held by one Ganya who was common ancestor of the parties. The case made out in the plaint is that Bala was the son of Ganya. Bala had three sons and two daughters. Rama and Babu are the two sons of Bala. Respondent is the daughter of Babu and the appellants are claiming through Rama. The finding recorded by the learned trial Judge in paragraph 9 of its judgment proceeds on assumption that Bala was the owner of the suit lands and therefore Babu, the father of the respondent will have 1/2 share in the suit lands. There is no basis which can be pointed out from the judgment of the

learned trial Judge for coming to the conclusion that Bala was the exclusive owner of the suit lands.

6. The appellate court has not at all recorded any finding regarding nature of the suit lands with reference to the controversy, whether the suit lands are ancestral properties in the hands of Ganya. The appellate court seems to have proceeded on assumption that Babu had 1/2 share in the suit lands. However, in paragraph 11 of its judgment, the appellate court has held that the plaintiff is the exclusive owner, who is entitled to inherit the share of Babu in his ancestral properties. The trial court has recorded a finding that the respondent / plaintiff has failed to prove that the suit lands are ancestral properties. However, the appellate court without discussing the evidence on record has merely observed that Babu had a share in the ancestral properties. In fact, there is no clear finding recorded by the appellate court on issue No.1 framed by the trial Court. The first appellate court is the final court of facts. It is the duty of the first appellate court to consider pleadings, oral evidence and exhibited documents on record and to record findings on all the issues involved in the Appeal. On plain reading of the

judgment of the appellate court, it is apparent that the appellate court has not performed its duty. That is how the substantial question of law arises in the second appeal and interference is called for. In view of the nature of the judgment of the appellate court, a case for remand of the matter is made out.

7. Hence, I pass the following order:

(1) Impugned judgment and decree dated 9th August, 2002 passed by the learned District Judge, Ratnagiri in Regular Civil Appeal No. 33 of 1997 is quashed and set aside and Regular Civil Appeal No.33 of 1997 is restored to file.

(2) Parties will appear before the learned District Judge, Ratnagiri on 6th June, 2005 for fixing the date of hearing. Considering the advanced age of the respondent, the learned District Judge will decide the appeal afresh in the light of the observations made in this Judgment, as expeditiously as possible and preferably on or before 31st

October, 2005.

(3) All contentions of the parties on merits are expressly kept open.

(4) Second Appeal is partly allowed in above terms with no order as to costs.

8. Parties and the concerned Court to act on the authenticated copy of this order.

Sd/-

(A. S. OKA, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 738 OF 2003

IN

SECOND APPEAL NO. 246 OF 2005

Govind Gangaram Khedekar & Ors. ... Appellants.

Versus

Savitri Ramji Khedekar..... ... Respondent.

Mr. Singhavi with Ms.Shalini Patil
for the Appellants.

Mr. H. V. Kode for the Respondent.

CORAM : A. S. OKA, J.

DATED : 21ST APRIL, 2005.

P.C.:

In view of the order passed in the second appeal, this civil application does not survive. Hence

rejected.

Sd/-

(A. S. OKA, J.)